

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

BECKY MCVAY, ) 3:13-cv-00359-HDM-WGC  
Plaintiff, )  
vs. ) ORDER  
ALLIED WORLD ASSURANCE COMPANY, )  
INC., and YORK RISK SERVICES )  
GROUP, INC., et al., )  
Defendants. )  
\_\_\_\_\_  
)

Before the court are the defendants' motions to dismiss for failure to state a claim (#15, #22). Plaintiff has opposed the motions (#16, #30, #33), and defendants have replied (#19, #35).

**Facts**

In August 2009, plaintiff slipped and fell in a gas station convenience store owned by the Fallon Tribal Development Corporation ("FTDC"), which is an entity of the Fallon Paiute-Shoshone Indian Tribe ("Tribe").<sup>1</sup>

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<sup>1</sup> Plaintiff filed a complaint against FTDC in tribal court, which was dismissed on sovereign immunity grounds. Plaintiff subsequently filed a motion to amend her complaint, which was heard by the tribal court in July 2012. The result of that hearing is not clear from this record.

1       The Tribe is covered by an insurance policy issued by  
 2 defendant Allied and administered by defendant York. The  
 3 "Sovereign Nation Commercial Insurance Policy" covers many things,  
 4 including "all sums for which the 'Insured' shall be legally  
 5 obligated to pay by reason of liability imposed upon the 'Insured'  
 6 by law . . . for damages . . . and expenses . . . on account of  
 7 'personal injuries' and/or 'property damage' arising out of any  
 8 'occurrence' happening during the period of this policy." (Allied  
 9 Mot. Dismiss Ex. A (Policy at 9)).

10       Plaintiff sent defendants a formal written demand on November  
 11 10, 2010, which was verbally denied on the grounds of the insured's  
 12 sovereign immunity. On June 22, 2011, defendants denied the claim  
 13 in writing on the grounds that adequate warning existed and no  
 14 other accidents had occurred on the premises.

15       Because she believes she cannot recover from the Tribe,  
 16 plaintiff now seeks in this litigation to recover from its insurer  
 17 Allied.

18 **Standard**

19       In considering a motion to dismiss under Rule 12(b) (6), the  
 20 court must accept as true all material allegations in the complaint  
 21 as well as all reasonable inferences that may be drawn from such  
 22 allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir.  
 23 2000). The allegations of the complaint also must be construed in  
 24 the light most favorable to the nonmoving party. *Shwarz v. United*  
 25 *States*, 234 F.3d 428, 435 (9th Cir. 2000). However, legal  
 26 conclusions are not entitled to the presumption of truth. *Ashcroft*  
 27 *v. Iqbal*, 556 U.S. 662, 679 (2009).

28       "Under the notice pleading standard of the Federal Rules,

1 plaintiffs are only required to give a 'short and plain statement'  
 2 of their claims in the complaint." *Paulsen v. CNF, Inc.*, 559 F.3d  
 3 1061, 1071 (9th Cir. 2009) (quoting *Diaz v. Int'l Longshore &*  
 4 *Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir. 2007)).  
 5 While this rule "does not require 'detailed factual allegations,' . . .  
 6 . . it demands more than an unadorned, the-defendant-unlawfully-  
 7 harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Bell*  
 8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, a  
 9 complaint "must contain sufficient factual matter . . . to state a  
 10 claim to relief that is plausible on its face." *Id.* "A claim has  
 11 facial plausibility when the plaintiff pleads factual content that  
 12 allows the court to draw the reasonable inference that the  
 13 defendant is liable for the misconduct alleged." *Id.* The  
 14 plausibility standard demands "more than a sheer possibility that a  
 15 defendant has acted unlawfully." *Id.* A pleading is insufficient  
 16 if it offers only labels and conclusions, a formulaic recitation of  
 17 the elements of a cause of action, or "naked assertions devoid of  
 18 further factual enhancement." *Id.* (internal punctuation omitted).

19 Neither party disputes that the policy may be considered by  
 20 this court in deciding the motions to dismiss. The parties also  
 21 agree that Nevada law applies.

## 22 **Analysis**

23 Plaintiff's amended complaint (#12) alleges that: (1) FTDC was  
 24 negligent; (2) plaintiff is entitled to recover for the injuries  
 25 she suffered as a result of FTDC's negligence; (3) plaintiff was a  
 26 third-party beneficiary of the contract between Allied and FTDC;  
 27 (4) Allied breached the contract when it denied plaintiff's claim;  
 28 and (5) York is liable to plaintiff as the third-party

1 administrator. Plaintiff asserts both breach of contract and  
2 breach of the implied covenant of good faith and fair dealing.

3       A. Breach of Contract

4       Defendants argue that as a prejudgment tort claimant and  
5 nonparty to the contract of insurance, plaintiff cannot pursue a  
6 direct action against them.

7       In Nevada, a "plaintiff suing a defendant for an alleged tort"  
8 cannot "bring an action for declaratory judgment against the  
9 defendant's insurance company regarding insurance coverage before  
10 obtaining a judgment against the defendant." *Knittle v.*  
11 *Progressive Cas. Ins. Co.*, 908 P.2d 724, 726 (Nev. 1996).  
12 Plaintiff argues *Knittle* is not controlling because she has no  
13 active complaint against the tortfeasor and cannot pursue one due  
14 to its claim of sovereign immunity. While *Knittle* involved a  
15 plaintiff who was pursuing a case against the tortfeasor but had  
16 not yet obtained judgment, that fact is not dispositive of this  
17 case.

18       First, *Knittle* cited with approval the following from *Farmers*  
19 *Ins. Exch. v. Dist. Court*, 862 P.2d 944 (Col. 1993):

20           [N]o legally protected right or cognizable  
21 interest [is] at stake unless and until  
22 [plaintiff] has established [the defendant's]  
23 liability. Her rights are contingent on her  
24 successful litigation of the personal injury  
25 suit. When the rights of the plaintiff are  
26 contingent on the happening of some event which  
27 cannot be forecast and which may never take  
28 place, a court cannot provide discretionary  
relief.

Importantly, the court held that a plaintiff would have a claim  
against the insurer only after establishing the tortfeasor's  
liability - an event that "may never take place." If true that

1 FTDC is insulated from liability by sovereign immunity, plaintiff  
 2 will never be able to establish her claim against FTDC. If FTDC is  
 3 not protected by sovereign immunity, plaintiff must pursue a claim  
 4 against FTDC before she can seek any relief from the insurer. In  
 5 either case, plaintiff's claims against the insurer cannot be  
 6 maintained.

7 In addition, in Nevada, third parties cannot bring bad faith  
 8 claims against a tortfeasor's insurance company because they have  
 9 no contractual relationship with the insurer - regardless of  
 10 whether there is a pending tort action against the tortfeasor. See  
 11 *Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1336 (Nev. 1992); see  
 12 also *Tweet v. Webster*, 610 F. Supp. 104, 105 (D. Nev. 1985) (noting  
 13 that Nevada does not recognize a duty to negotiate in good faith  
 14 running from an insurer to a third party). Logically, then, a  
 15 third-party claimant also may not sue the insurer for "breach of  
 16 contract." In fact, an unpublished Ninth Circuit opinion broadly  
 17 held that in Nevada, "third-party claimants . . . who are injured  
 18 by an insured lack standing to sue the insured party's insurance  
 19 company directly." *Kinzler v. Calvert Ins. Co.*, 255 Fed. App'x  
 20 116, 117 (9th Cir. 2007) (unpublished disposition) (citing *Gunny*,  
 21 830 P.2d at 1335-36). In *Kinzler*, the plaintiff had actually  
 22 obtained a judgment against the tortfeasor and was seeking an order  
 23 requiring the tortfeasor's insurance to pay the judgment. Even  
 24 then, the Ninth Circuit held the plaintiff had no right under  
 25 Nevada law to recover against the tortfeasor's insurer.

26 Plaintiff has not cited any case in which a person was allowed  
 27 to directly proceed against their tortfeasor's insurer.  
 28 Nevertheless, she advances several unpersuasive arguments in

1 support of her claim.

2 First, plaintiff argues that public policy and common sense  
3 dictate that insurance companies pay for injuries suffered by  
4 victims of tribal torts. She contends that because tribes have  
5 sovereign immunity, and because federal law requires tribes to have  
6 liability insurance, there would be no purpose of having liability  
7 insurance if the tribe's insurer was not required to pay for  
8 injuries caused by the tribe, its entities or its representatives.

9 Plaintiff bases her argument on 25 U.S.C. § 450f(c), which is  
10 part of the Indian Self-Determination and Education Assistance Act  
11 ("ISDEAA"). The ISDEAA allows tribes to take over some of the  
12 federal government's trust duties to them, such as law enforcement,  
13 health services, and schooling. (Doc. #35 (Allied Reply Ex. A  
14 (Cohen's Handbook of Federal Indian Law, § 22.02[1], at 1386-87  
15 (2012 ed.))). To do so, the tribes enter into "self-determination  
16 contracts," which are defined as contracts, grants, or cooperative  
17 agreements "between a tribal organization and the appropriate  
18 Secretary for the planning, conduct and administration of programs  
19 and services which are otherwise provided to Indian tribes and  
20 their members pursuant to Federal law." 25 U.S.C. § 450b(j).  
21 Section 450f(c) requires the government to purchase liability  
22 insurance for all activities of tribes carrying out self-  
23 determination contracts. This provision applies only to activities  
24 carried out as part of a self-determination contract. *Id.* §  
25 450f(c) ("[T]he Secretary shall be responsible for obtaining or  
26 providing liability insurance or equivalent coverage, on the most  
27 cost-effective basis, for Indian tribes, tribal organizations, and  
28 tribal contractors carrying out contracts, grant agreements and

1 cooperative agreements pursuant to this subchapter.") (emphasis  
2 added) (subchapter refers to the ISDEAA); see also *Demontiney v.*  
3 *United States*, 255 F.3d 801, 813 (9th Cir. 2001) ("Any effect of §  
4 450f(c) is limited by the section to 'contracts . . . pursuant to  
5 this subchapter.'"). Further, the ISDEAA provides that "[n]othing  
6 in this subchapter shall be construed as . . . affecting,  
7 modifying, diminishing, or otherwise impairing the sovereign  
8 immunity from suit enjoyed by an Indian tribe." 25 U.S.C.A. §  
9 450n(1). Claims based on tribal activities taken pursuant to a  
10 self-determination contract are treated as claims against the  
11 United States and must be pursued under the Federal Tort Claims  
12 Act. *Id.* § 450f(d); Pub. L. No. 101-512, § 314 (note to § 450f);  
13 Cohen's Handbook of Federal Indian Law, § 22.02[4][a], at 1391.

14 Defendants argues that the Tribe has a number of self-  
15 determination contracts and the policy covers those services as  
16 well as other aspects of the Tribe's operations that do not fall  
17 under the ISDEAA. Additionally, defendants assert that the  
18 activities of the FTDC are not funded by self-determination  
19 contracts because the government has no trust duties to provide  
20 business services to the tribe. Plaintiff has not alleged that the  
21 FTDC's conduct in this case is pursuant to a self-determination  
22 contract. However, she argues that the provision has a broader  
23 application. Plaintiff maintains that "legislative history" shows  
24 the purpose of § 450f is to provide an avenue of civil relief for  
25 injured claimants. The legislative history plaintiff cites is the  
26 "Indian Tribal Tort Claims and Risk Management Act of 1998," which  
27 is a note to § 450f. Pub. L. No. 105-277, § 101(e). While that  
28 act clearly shows a concern for victims of tribal torts, it

1 requires only a study of the liability insurance available to  
2 tribes and annual reports to Congress containing "legislative  
3 recommendations that the Secretary determines to . . . otherwise  
4 achieve the purpose of providing relief to persons who are injured  
5 as a result of official action of a tribal government." 25 U.S.C.  
6 § 450f note, § 704, Pub L. 105-277. Nothing in the note suggests  
7 tribes must obtain liability coverage for all their activities.  
8 The note orders only a study and no definitive relief for those  
9 victims. Moreover, even if the tribe's activities in this case are  
10 covered by § 450f, plaintiff's claim must be treated as one against  
11 the United States and pursued under the FTCA.

12 Second, plaintiff argues that defendants improperly invoked  
13 sovereign immunity under the insurance contract, and that  
14 defendants should not be allowed to use such "fraudulent acts" to  
15 avoid their liability to her. Plaintiff relies on *Albert H.*  
16 *Wohlers v. Bartgis*, 969 P.2d 949 (Nev. 1998) for her position. She  
17 seems to contend that *Wohlers* stands for the proposition that an  
18 insurer may not use its own fraudulent acts to avoid liability for  
19 bad faith. The "fraudulent act" plaintiff points to is defendants'  
20 failure to timely obtain written approval from the Tribe before  
21 invoking sovereign immunity as required by the insurance contract.  
22 Plaintiff lacks standing to enforce the parties' contract because  
23 she is not a party to it, nor is she (as will be seen shortly) an  
24 insured or a specific intended beneficiary of the policy.  
25 Moreover, defendants' alleged failure to strictly comply with  
26 notification processes of their contract does not amount to a  
27 fraudulent act.

28 Finally, plaintiff argues that she can pursue her claims

1 against defendants under the contract because she is either (1) a  
 2 named insured or (2) a specific intended beneficiary of the  
 3 contract.

4                   i. Named Insured

5                 An insured may be able to sue an insurer for bad faith denial  
 6 of her own benefits, even if she's not the contracting party. See  
 7 *Bergerud v. Progressive Cas. Ins.*, 453 F. Supp. 2d 1241, 1249 (D.  
 8 Nev. 2006) (Pro, J.).

9                 The policy here defines insured to include:

10               Any official, executive officer or director,  
 11 trustee, member, partner, employee, intern or  
 12 volunteer of the Named Insured while acting  
 13 within the scope of his or her duties as such,  
 14 and any person, organization, trustee or estate  
 15 to whom the Named Insured is obligated by  
 16 virtue of a written contract or oral agreement  
 17 to provide insurance such as is afforded by  
 18 this policy, but only in respect to liability  
 for "personal injuries" or "property damage"  
 caused, in whole or in part, by the Named  
 Insured's acts or omissions or the acts or  
 omissions of those acting on the Named  
 Insured's behalf, in the performance of the  
 Named Insured's ongoing operations or in  
 connection with premises owned by or rented to  
 the Named Insured.

19 (Allied Mot. Dismiss Ex. A (Policy at 8)).

20               Plaintiff argues that she is a person to whom the Tribe must  
 21 provide insurance under a "written contract." The "written  
 22 contract" she refers to is the "Indian Self-Determination  
 23 Contract." As previously discussed, there has been no showing that  
 24 any such contract exists that covers the tribe's activities in this  
 25 case.

26                   ii. Specific Intended Beneficiary

27                 "Whether an individual is an intended third-party beneficiary  
 28 . . . depends on the parties' intent, 'gleaned from reading the

1 contract as a whole in light of the circumstances under which it  
2 was entered." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d  
3 599, 605 (Nev. 2005); see also *Robert Dillon Framing, Inc. v.*  
4 *Canyon Villas Apartment Corp.*, 2013 WL 3984885 (Nev. Apr. 17, 2013)  
5 (unpublished disposition) ("An intended third-party beneficiary  
6 must show that the parties to the contract clearly intended to  
7 benefit him. . . . Third-party beneficiary status requires more  
8 than the receipt of incidental benefits.").

9 Plaintiff has alleged no facts and has pointed to nothing in  
10 the contract itself showing that it was the parties' intent that  
11 victims of the insured be specific intended beneficiaries under the  
12 contract. Rather, she argues that she is a specific intended  
13 beneficiary because federal law requires tribes to have general  
14 liability insurance. For the reasons already discussed, that  
15 argument is without merit. The ISDEAA does not apply in this case.  
16 Plaintiff has not identified any other federal law requiring tribes  
17 to obtain general liability insurance for all their activities, or  
18 - more importantly - requiring those insurance companies to cover  
19 all claims based on those activities regardless of the Tribe's  
20 underlying sovereign immunity. Thus, plaintiff is not a specific  
21 intended beneficiary of the contract and is, at most, an  
22 "incidental beneficiary," because the Tribe, "like all parties  
23 purchasing [general liability insurance] coverage did so to protect  
24 itself against potential liability, rather than with any specific  
25 intent to benefit an unknown class of individuals that it might  
26 injure in the future." *Kinzler*, 255 Fed. App'x at 117. Incidental  
27 beneficiaries may not proceed directly against insurance companies  
28 for breach of contract or bad faith. *United Fire Ins. Co. v.*

1   McClelland, 780 P.2d 193, 197-98 (Nev. 1989). Accordingly,  
 2 plaintiff's breach of contract claim against both Allied and York  
 3 should be dismissed.

4                  B. Breach of the Covenant of Good Faith and Fair Dealing

5                  In Nevada, "liability for bad faith is strictly tied to the  
 6 implied-in-law covenant of good faith and fair dealing arising out  
 7 of an underlying contractual relationship. When no contractual  
 8 relationship exists, no recovery for bad faith is allowed."

9   McClelland, 780 P.2d at 197. As discussed above, third parties  
 10 cannot bring bad faith claims against a tortfeasor's insurance  
 11 company because they have no contractual relationship with the  
 12 insurer. *Gunny*, 830 P.2d at 1336; *Tweet*, 610 F. Supp. at 105.  
 13 While a plaintiff might be able to sue an insurer for bad faith  
 14 denial of her own benefits if she is an insured or specific  
 15 intended beneficiary of the policy, *Bergerud*, 453 F. Supp. 2d at  
 16 1249; *Vignola v. Gilman*, 804 F. Supp. 2d 1072, 1076 (D. Nev. 2011)  
 17 (Pro, J.), plaintiff is neither. While a third party might be able  
 18 to assert a bad faith claim against the tortfeasor's insurer where  
 19 it "relied to its detriment on actions or representations made by  
 20 the insurer," *Vignola*, 804 F. Supp. 2d at 1076, plaintiff has  
 21 alleged no facts - in her complaint or her opposition - indicating  
 22 she relied to her detriment on actions or representations of the  
 23 defendants. She argues only that she *subconsciously* relied on the  
 24 gas station having liability insurance. Accordingly, plaintiff has  
 25 not established any basis for allowing her to proceed against the  
 26 defendants on the theory of bad faith.

27                  **II. Amendment**

28                  Plaintiff seeks leave to amend her complaint if the motion to

1 || dismiss is granted.

Under Federal Rule of Civil Procedure 15(a)(2), "the court should freely give leave [to amend] when justice so requires." However, leave to amend is not to be granted automatically." *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013). The court "considers the following five factors to assess whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *Id.* (internal punctuation omitted).

11 The court concludes that any such amendment would be futile.  
12 Accordingly, plaintiff's request for leave to amend her complaint  
13 is denied..

14 || Conclusion

15 Because the plaintiff has not obtained a judgment against  
16 FTDC, she is not a named insured or specific intended beneficiary  
17 of the contract, and she has not alleged any acts or  
18 representations of the insurer that caused her to act in reliance  
19 on them, the defendants' motions to dismiss (#15, #22) are **GRANTED**.  
20 Plaintiff's request for leave to amend is **DENIED**, and this action  
21 is hereby **DISMISSED**. The clerk of the court shall enter judgment  
22 accordingly.

IT IS SO ORDERED.

24 DATED: This 18th day of April, 2014.

Howard D McKibben

UNITED STATES DISTRICT JUDGE